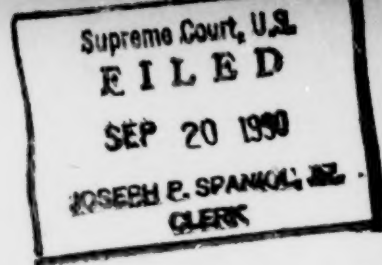


①  
**90-518**

NO.



---

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROBERT E. WELSH,  
Petitioner

versus

COMMONWEALTH OF PENNSYLVANIA,  
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE  
PENNSYLVANIA SUPERIOR COURT

---

PETITION FOR WRIT OF CERTIORARI

---

Robert E. Welsh  
PETITIONER  
103 Woodhaven Drive  
Pittsburgh, PA 15228  
(412) 563-3161



## QUESTIONS FOR REVIEW

1. Whether defense counsel's failure to use the preliminary hearing testimony of the prosecution's only witness to impeach his trial testimony on cross-examination violated petitioner's Sixth Amendment right to effective assistance of counsel?
2. Whether defense counsel's misunderstanding of the law upon which the charge was based violated petitioner's Sixth Amendment right to effective assistance of counsel?
3. Whether defense counsel's failure to prepare an alternate defense violated petitioner's Sixth Amendment right to effective assistance of counsel?

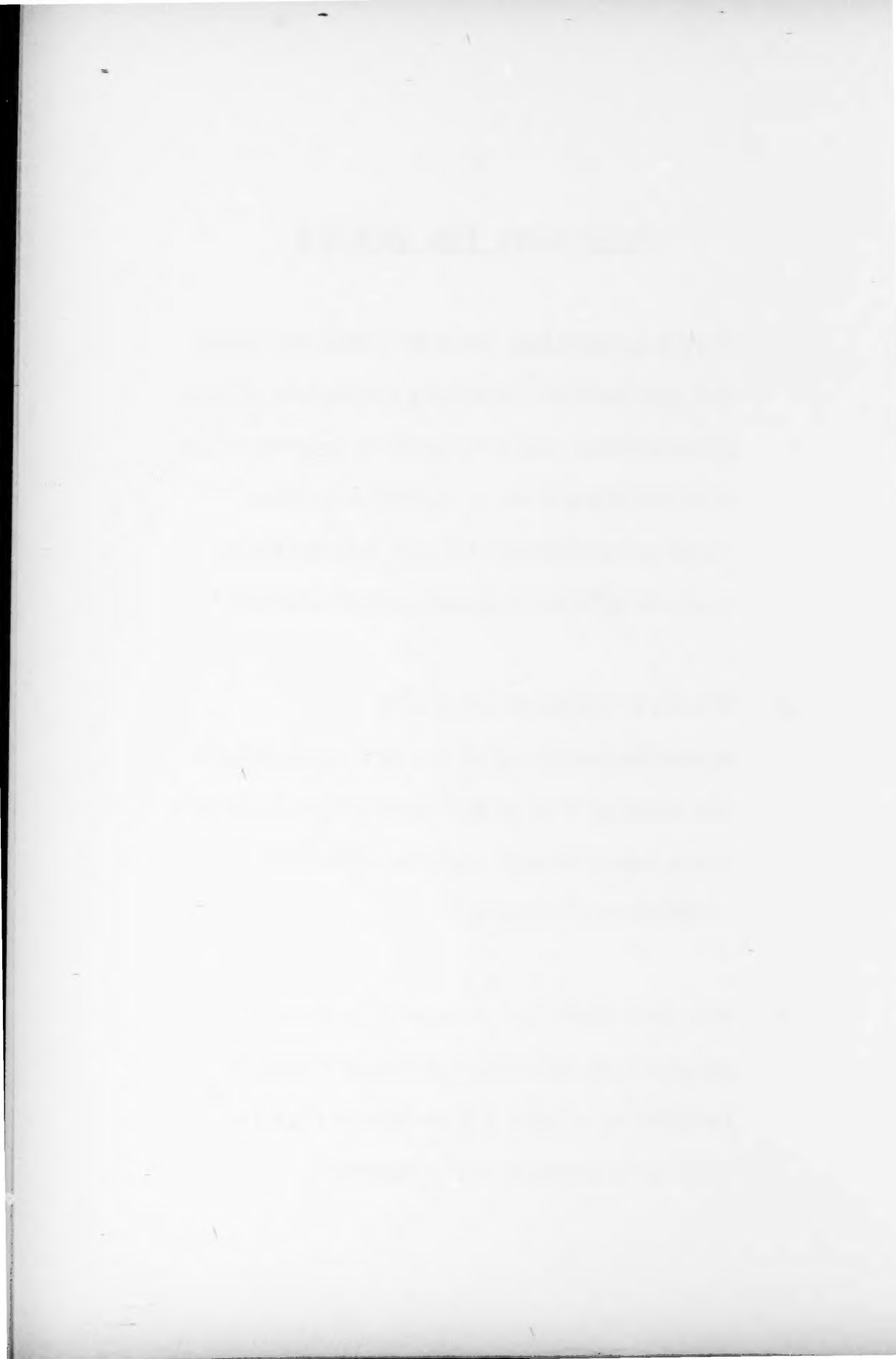
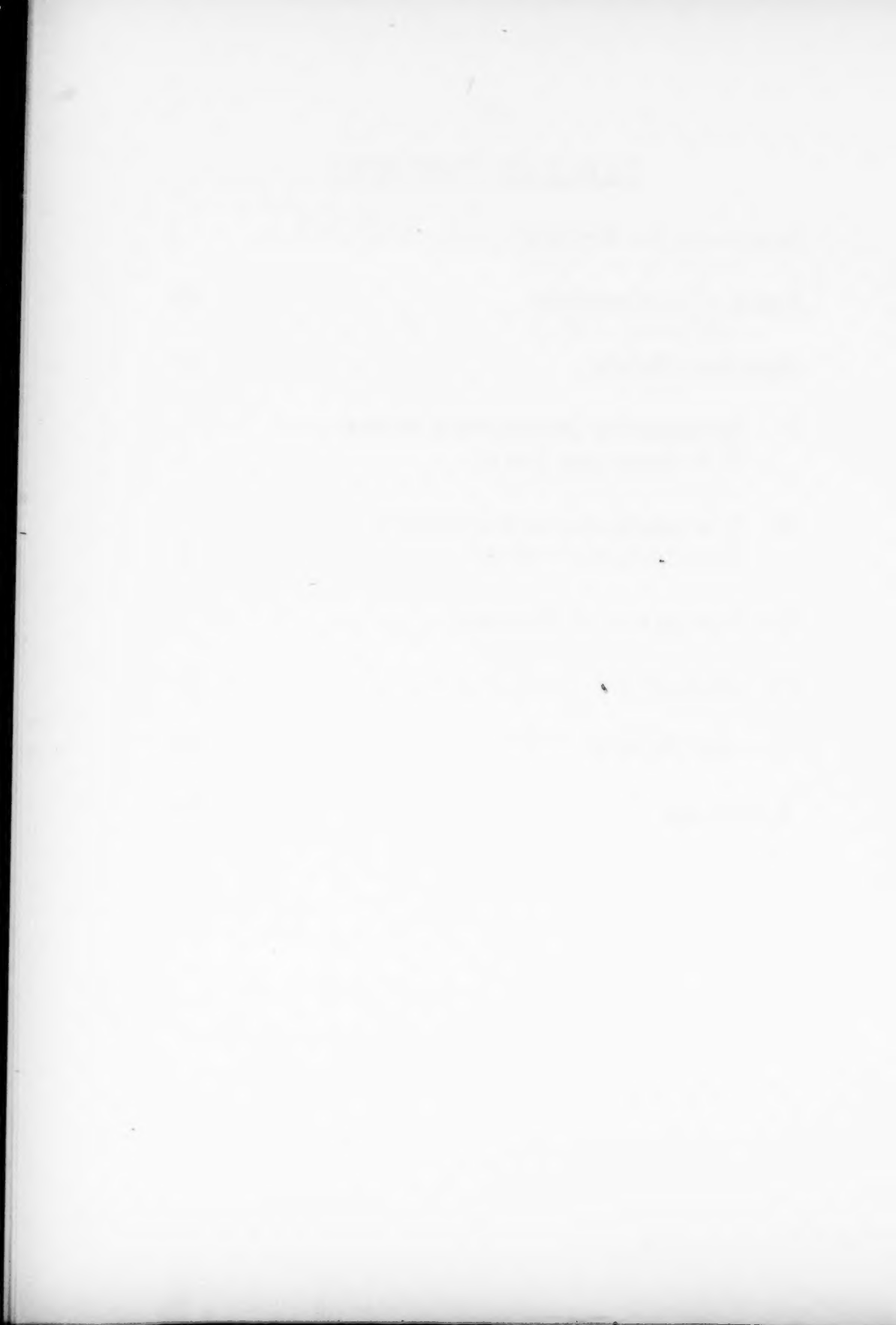


TABLE OF CONTENTS

Questions for Review .....	i
Table of Authorities .....	iii
Opinions Below .....	iv
I    Grounds for Jurisdiction of the U. S. Supreme Court .....	1
II   Constitutional and Statutory Provisions Involved .....	2
III Statement of the Case .....	7
IV   Argument .....	13
V    Conclusion .....	25
Appendix .....	26



## TABLE OF AUTHORITIES

### CASES:

<u>Commonwealth v. Brady</u> .....	17
510 Pa. 123, 507 A.2d 66 (1986)	
<u>Commonwealth v. Smith</u> .....	23
417 Pa. 321, 208 A.2d 219 (1965)	
<u>Commonwealth v. Twiggs</u> .....	16
460 Pa. 105, 331 A.2d 440 (1975)	
<u>Davis v. State of Alaska</u> .....	16, 22
415 U.S. 308, 94 S.Ct. 1105 (1974)	
<u>Greene v. McElroy</u> .....	18
360 U.S. 474, 79 S.Ct. 1400 (1959)	
<u>Leeth v. State</u> .....	14
94 Okla.Crim. 61, 230 P.2d 942 (1951)	
<u>State v. Reyes</u> .....	14
209 Or. 607, 308 P.2d 182 (1957)	
<u>Strickland v. Washington</u> .....	24
466 U.S. 668, 104 S.Ct. 2052 (1984)	
<u>United States v. DeCoster</u> .....	19
487 F.2d 1197 (D.C.Cir.1973)	

**TREATISES:**

"Wiretapping and Electronic Eavesdropping: The Law and Its Implications", by Juris Cederbaum, Vol. 2, pg. 34 .....	14
---	----

**CONSTITUTIONAL PROVISIONS AND STATUTES**

Sixth Amendment to the U. S. Constitution .....	2, 9, 13, 24
Pennsylvania Motor Vehicle Code, Section 3334 .....	2, 7
Pennsylvania Motor Vehicle Code, Section 3362 .....	4, 7
Pennsylvania Vehicle Code, Section 3733 .....	6, 7, 8, 12, 19, 21

**OPINIONS BELOW**

There are no reported opinions in this case. The opinion of the Pennsylvania Superior Court is attached hereto as Appendix A. The opinion of the Common Pleas Court of Westmoreland County, Pennsylvania is attached hereto as Appendix B.



I

GROUNDS FOR JURISDICTION

The opinion and order sought to be reviewed by this Court was entered by the Pennsylvania Superior Court on September 26, 1989. An Application for Reargument on this order was filed with the Pennsylvania Superior Court on October 10, 1989 but was denied on November 6, 1989. A Petition for Allowance of Appeal was filed with the Pennsylvania Supreme Court on December 5, 1989, but was denied on June 22, 1990.

The U. S. Supreme Court has jurisdiction to review this matter upon certiorari pursuant to 28 U.S.C. §1257(3), in that the petition requests the Court to review the Pennsylvania Superior Court's decision regarding a federal issue, namely, whether petitioner's right to effective assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution has been violated.

II

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

**Sixth Amendment to the U. S. Constitution**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

**Section 3334, Pennsylvania Vehicle Code**

**Turning movements and required signals**

(a) General rule.-Upon a roadway no person shall turn a vehicle or move from one traffic lane to another or enter the traffic stream from

a parked position unless and until the movement can be made with reasonable safety nor without giving an appropriate signal in the manner provided in this section.

(b) Signals on turning and starting.-At speeds of less than 35 miles per hour, an appropriate signal of intention to turn right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning. The signal shall be given during not less than the last 300 feet at speeds in excess of 35 miles per hour. The signal shall also be given prior to entry of the vehicle into the traffic stream from a parked position.

(c) Limitations on use of certain signals.-The signals required on vehicles by section 3335(b) (relating to signals by hand and arm or signal lamps) shall not be flashed on one side only on disabled vehicles, flashed as a courtesy or "do pass" signal to operators of other vehicles approaching from the rear, nor be flashed on

one side only of a parked vehicle except as may be necessary for compliance with this section.

(d) Discontinuing turn signals.-Turn signals shall be discontinued immediately after completing the turn or movement from one traffic lane to another traffic lane.

### **Section 3362, Pennsylvania Vehicle Code**

#### **Maximum speed limits**

(a) General rule.-Except when a special hazard exists that requires lower speed for compliance with section 3361 (relating to driving vehicle at safe speed), the limits specified in this subsection or established under this subchapter shall be maximum lawful speeds and no person shall drive a vehicle at a speed in excess of the following maximum limits:

(1) 35 miles per hour in any urban district.

(2) 55 miles per hour in other locations.

(3) Any other maximum speed limit established under this subchapter.

(b) Posting of speed limit.-No maximum speed limit established under subsection (a) (1) or (3) shall be effective unless posted on fixed or variable official traffic-control devices erected in accordance with regulations adopted by the department which regulations shall require posting at the beginning and end of each speed zone and at intervals not greater than one-half mile.

(c) Penalty.-Any person violating this section is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of \$35. Any person exceeding the maximum speed limit by more than five miles per hour shall pay an additional \$2 per mile for each mile in excess of five miles per hour over the maximum speed limit.

**Section 3733, Pennsylvania Vehicle Code**

**Fleeing or attempting to elude police officer**

(a) **Offense defined.**-Any driver of a motor vehicle who willfully fails or refuses to bring his vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle, when given visual or audible signal to bring the vehicle to a stop, is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of \$200.

(b) **Signal by police officer.**-The signal given by the police officer may be by hand, voice, emergency lights or siren.

(c) **Defenses.**-It is a defense to a prosecution under this section that the pursuing police vehicle was not clearly identifiable by its markings or, if unmarked, was not occupied by a police officer who was in uniform and displaying a badge or other sign of authority.

III

STATEMENT OF THE CASE

The petitioner was cited under Sections 3362(a)(2), 3334(a), and 3733(a) of the Pennsylvania Motor Vehicle Code for speeding, turn signals, and fleeing and eluding a police officer. After the petitioner was found guilty at a preliminary hearing before Magistrate Scott, the petitioner appealed and a hearing de novo was held before Common Pleas Court of Westmoreland County. Trooper Stanley, the Commonwealth's only witness, testified that he had used radar to find that the petitioner was traveling ten miles per hour over the speed limit, at which time he pulled out onto the road to follow the petitioner. The officer testified that he was driving an unmarked police car and he did not pull in behind the petitioner, but remained alongside his left rear fender and motioned to the right. The officer testified that the petitioner immediately responded to this



direction by bearing right at a junction in the road. The petitioner testified that he thought that the unmarked car was clearing the way for an emergency vehicle. The officer admitted that when he turned on to the road and positioned his car behind the petitioner signalling him to stop, he did so immediately.

The petitioner filed pro se post-verdict motions. The petitioner's claims included: (1) that defense counsel was ineffective in failing to use the tape recording of the preliminary hearing testimony to impeach the testimony of the Commonwealth's only witness by showing that the officer had substantially changed significant facts and figures from that which he gave during his preliminary hearing testimony, and (2) that the defense provided under Section 3733(c) applied, since the officer was driving an unmarked car and had not displayed a badge or other sign of authority. In his Motion in Arrest of Judgment, the



petitioner raised the federal issue that his Sixth Amendment right to effective assistance of counsel had been violated, stating that, "Defendant contends that his attorney, William McCabe, was incompetent and ineffective in his preparation for and representation of the defendant at the February 17, 1988 trial before Judge Ambrose, as demonstrated by the following." (Motion in Arrest of Judgment, Page 1, Paragraph 3).

Specific instances of counsel's ineffectiveness were further cited by petitioner in Motion in Arrest of Judgment, in which petitioner argued that, "Attorney McCabe failed to impeach contradictory statements of the Commonwealth's witness, Pennsylvania State Trooper Frank Stanley, during the February 17, 1988 hearing by comparing them to the trooper's earlier testimony given at the preliminary hearing on September 15, 1987 (Exhibit 1), only 12 days after the alleged

violations, when his recollection would have been fresh, rather than six months later, when his memory would have faded." (Motion in Arrest of Judgment, Page 1, Paragraph 3(b)).

Petitioner further argued in the Motion in Arrest of Judgment that, "Attorney McCabe had no alternate strategy to protect the defendant when his only defense, which was based on the premise that the Commonwealth had to prove intent on the evasion charge, was rejected by the court." (Motion in Arrest of Judgment, Page 2, Paragraph 3(x)).

These claims constitute the basis for the three Questions for Review presented in this Petition.

In denying the petitioner's post-verdict motions, the lower court declined ruling on the petitioner's ineffectiveness claims, and no hearing was held to investigate the merits of these claims. The claim of ineffectiveness was again raised before the trial court in

subsequent post-trial motions, but these motions were also denied without a ruling from the court on the ineffectiveness issue.

The Petitioner then filed a pro se appeal of the sentencing order with the Pennsylvania Superior Court. The case was argued before a panel of that Court on June 7, 1989. In his Brief for Appellant filed with the Pennsylvania Superior Court, the petitioner raised as a question for review, "Whether defense counsel was ineffective." (Brief for Appellant, Page 3, Paragraph IV). Petitioner specifically claimed that "Defense Counsel failed to provide alternate defenses to protect his client. Defense Counsel failed to impeach the Trooper's testimony as not credible by using prior inconsistent testimony, as detailed later in this Argument." (Brief for Appellant, Page 26, Paragraph 72). Further, the petitioner argued that, "Defense Counsel's strategy was based on

his misunderstanding of Section 3733(a)." (Brief for Appellant, Page 27, Paragraph 74).

On September 26, 1989, the Superior Court issued its opinion and order affirming judgment of sentence of the lower court. In its opinion, the Court rejected the petitioner's ineffectiveness claims (see Appendix A, pages A-11 and A-12). An application for reargument on this order was filed by the petitioner with the Superior Court on October 10, 1989 but was denied on November 6, 1989. A petition for allowance of appeal was filed with the Pennsylvania Supreme Court on December 5, 1989, with the petitioner's ineffectiveness claim raised in Question for Review II. The petition was denied on June 22, 1990.

IV

ARGUMENT

The petitioner's Sixth Amendment right to effective assistance of counsel has been violated.

IMPORTANT EVIDENCE WAS NOT INTRODUCED

During cross-examination, defense counsel did not introduce into evidence the tape recording of the preliminary hearing testimony of the prosecution's only witness in order to impeach his trial testimony.

Defense counsel possessed evidence to impeach the testimony of the prosecution's only witness, police officer Frank Stanley. This evidence was the tape recording of officer Stanley giving his testimony at the preliminary hearing. Defense counsel had reviewed the contents of this tape recording prior to the trial. At the trial, defense counsel recognized that officer Stanley's testimony differed significantly

from his preliminary hearing testimony, thereby distorting the chain of events which led to the charges. During cross-examination, defense counsel failed to confront the prosecution's witness with these important differences between his two testimonies.

"In *State v. Reyes* (209 Or. 607, 308 P.2d 182 (1957)), the court stated that a recording has value as evidence lacking in a written statement, for it reproduces the very words used by the person making the statement in his own voice and with all the added significance that comes from inflection, emphasis, and the various attributes of speech. Further, sound recordings have been admitted as evidence for the purpose of impeaching the testimony of a witness with a prior inconsistent statement (*Leeth v. State*, 94 Okla. Crim. 61, 230 P.2d 942 (1951))." ("Wiretapping and Electronic Eavesdropping: The Law and Its Implications", by *Juris Cederbaum*, Vol. 2, pg. 34).

DEFENSE COUNSEL FAILED TO ACT AS ADVOCATE

Defense counsel neglected his duty as the petitioner's advocate by disregarding his many opportunities during cross-examination to impeach the testimony of the prosecution's only witness in order to defend his client against the inaccuracies in the witness' testimony.

Since defense counsel was aware that the testimony of Trooper Stanley had differed significantly from his preliminary hearing testimony, an obvious defense was to cross-examine the witness on these inconsistencies to raise doubts regarding the truthfulness and accuracy of his testimony. This Court has held, "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to . . . , the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but



the cross-examiner has traditionally been allowed to impeach, i. e., discredit, the witness."

Davis v. State of Alaska, 415 U.S. at 316, 94 S.Ct. at 1110 (1974).

NECESSITY FOR DEFENSE TO IMPEACH TESTIMONY

Whereas the prosecution's case consisted entirely of the testimony of its only witness, the credibility of his testimony was essential. Regarding the importance of testing the credibility of the prosecution's witness, the Pennsylvania Supreme Court has ruled, "In a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a known witness who might be capable of casting a shadow upon the Commonwealth's witness's truthfulness is ineffective assistance of counsel." Com. v. Twiggs, 460 Pa. 105, 331 A.2d 440 (1975). Further, in Commonwealth v. Brady, the



Pennsylvania Supreme Court held, "otherwise admissible prior inconsistent statements of a declarant who is a witness in a judicial proceeding and is available for cross-examination may be used as substantive evidence to prove the truth of the matters asserted therein." (Com. v. Brady, 510 Pa. 123, 507 A.2d 66 (1986)). The court also observed, "Moreover, the prior statement can be viewed as possessing superior indicia of reliability as it was rendered at a point in time closer to the event described--usually much closer--when memory will presumably be fresher and opportunity for fabrication lessened." (Com. v. Brady, 510 Pa. 123, 507 A.2d 66 (1986)).

Defense counsel was obligated to confront the witness on cross-examination to impeach his testimony and cast doubt on its credibility. As this Court has noted, "Professor Wigmore, commenting on the importance of

cross-examination, states in his treatise, 5  
Wigmore on Evidence (3d ed. 1940) §1367:

'For two centuries past, the policy of  
the Anglo-American system of Evidence  
has been to regard the necessity by  
cross-examination as a vital feature of  
the law. The belief that no safeguard for  
testing the value of human statements is  
comparable to that furnished by cross-  
examination, and the conviction that no  
statement (unless by special exception )  
should be used as testimony until it has  
been probed and sublimated by that test,  
has found increasing strength in  
lengthening experience.'"

(Greene v. McElroy, 360 U.S. at 497, 79 S.Ct. at  
1414 (1959)).

Defense counsel's failure to raise and  
develop the defense that the testimony of the  
prosecution's only witness was not credible  
constituted a breakdown of the adversarial

process. "The Supreme Court has noted that the adversary system requires that 'all available defenses are raised' so that the government is put to its proof." (United States v. DeCoster, Jr., 487 F.2d at 1204 (1973)).

INSUFFICIENT PREPARATION FOR TRIAL

Defense counsel's strategy was based on his misunderstanding of Section 3733(a). In his summation at the trial, defense counsel argued, "I understand that, but there's two ways you can cite that charge. You can cite it as willfully failing or refusing to bring your vehicle to a stop or willfully fleeing or attempting to elude a police officer. The officer's testimony, the gist of it here, isn't that he refused to stop. I think that's an entirely different matter." (Trial Transcript: Page 52, Lines 17-25 and Page 53, Lines 1-3). The trial judge then explained to defense counsel that there is only one offense within Section 3733(a), and not two separate offenses which

was the basis of the only defense he had prepared for the petitioner.

A fundamental requirement of effective representation must be an understanding of the charge against the petitioner and the governing statute. Defense counsel's misunderstanding regarding the scope of the charge of fleeing and eluding brought against the petitioner was a serious handicap in developing and presenting a relevant and successful defense. Without an understanding of what the prosecution was required to prove, defense counsel was not able to prepare an effective defense against the prosecution's charges.

NO ALTERNATE DEFENSE PROVIDED

When the basis of his only defense collapsed, defense counsel did not have an alternate defense prepared to argue before the court. Defense counsel could have argued an obvious defense expressly provided by the law

that the officer was in an unmarked car and that he did not identify himself by showing his badge. This defense is defined under Section 3733(c) of the Pennsylvania Motor Vehicle Code.

Defense counsel's failure to raise all available defenses and to adequately meet the prosecution's case resulted in a breakdown of the adversarial process which rendered the outcome of the trial unreliable.

If defense counsel had understood the statute and its explicit defense and used it together with the evidence which defense counsel withheld, there is a reasonable probability that the court would have reached a "not guilty" verdict.

#### TRIAL COURT DEPRIVED OF IMPORTANT EVIDENCE

Since the case consisted of the testimony of the prosecution's only witness versus that of the petitioner, a crucial issue under consideration by the court was the credibility

to be afforded each witness. By failing to introduce the preliminary hearing testimony of the prosecution's witness, defense counsel deprived the court of the opportunity to hear and weigh all evidence in order to judge the credibility of the testimony of the prosecution's only witness. This Court has held, "... the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof ... of petitioner's act.'" (Davis v. State of Alaska, 415 U.S. at 317, 94 S.Ct. at 1111 (1974)).

The trial court relied on the ability of defense counsel to have brought to its attention all evidence pertinent to the case and to have explored all avenues of defense. The court therefore would presume that all relevant matters had been argued in defense of the petitioner.

In arriving at the verdict, the trial court considered the credibility of the testimony of the prosecution's only witness and the petitioner. The court wrote in its opinion, "After making a careful evaluation of the different testimony of the two (2) witnesses who testified in this case, the Court found Trooper Stanley's testimony to be worthy of belief." (Appendix B, Pg A20).

If defense counsel had impeached Trooper Stanley's trial testimony by questioning the changes he made since the preliminary hearing, the court may well have doubted the reliability of his testimony. In *Com. v. Smith*, the Pennsylvania Supreme Court held, "Where the jury is in doubt as to whether or not to believe a witness, the smallest feather of a palpable exaggeration or an inconsistency in a witness's statement on a minor point may be the very item to tip the scales and discredit



the witness on his main testimony." (Com v. Smith, 417 Pa. 321, 208 A.2d 219 (1965)).

Defense counsel's ineffective cross-examination failed to subject the prosecution's case to meaningful adversarial testing; therefore, the petitioner was deprived of a fair trial. As this Court has ruled, "Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." (Strickland v. Washington, 466 U.S. at 685, 104 S.Ct. at 2063 (1984)).



V

CONCLUSION

WHEREFORE, it is prayed that this  
Petition for Writ of Certiorari be granted, and a  
hearing be had in the Supreme Court of the  
United States.

Respectfully submitted,

*Robert E. Welsh*

Robert E. Welsh,

PETITIONER

103 Woodhaven Drive

Pittsburgh, PA 15228

(412) 563-3161



## APPENDIX

### PAGE

A	Opinion and Order of the Pennsylvania Superior Court Affirming the Court of Common Pleas, Westmoreland County, Pennsylvania Judgment of Sentence September 26, 1989	A 1
B	Opinion and Order of the Court of Common Pleas, Westmoreland County, Pennsylvania August 12, 1988	A 14
C	Sentencing Order of the Court of Common Pleas, Westmoreland County, Pennsylvania September 26, 1988	A 24
D	Order of the Pennsylvania Superior Court Denying Petitioner's Application for Reargument November 6, 1989	A 26
E	Order of the Pennsylvania Supreme Court Denying Petitioner's Petition for Allowance of Appeal June 22, 1990	A 27

# APPENDIX

## PAGE

A1	General and Order of the Board of Directors Following the death of Governor John H. Brown September 12, 1859
A12	Minutes and Order of the Board of Directors September 12, 1859
A14	Minutes and Order of the Board of Directors September 12, 1859
A15	Minutes and Order of the Board of Directors September 12, 1859
A16	Minutes and Order of the Board of Directors September 12, 1859
A17	Minutes and Order of the Board of Directors September 12, 1859
A18	Minutes and Order of the Board of Directors September 12, 1859
A19	Minutes and Order of the Board of Directors September 12, 1859
A20	Minutes and Order of the Board of Directors September 12, 1859

APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA  
No. 01623 Pittsburgh, 1988

COMMONWEALTH OF PENNSYLVANIA,  
Appellee

V.

ROBERT E. WELSH,  
Appellant

Appeal From Judgment of Sentence,  
Court of Common Pleas, Criminal Division,  
Westmoreland County  
No. 1915 C 1987

BEFORE: CAVANAUGH, DEL SOLE,  
MONTGOMERY, JJ.

MEMORANDUM: FILED: SEPTEMBER 26, 1989

This pro se appeal follows judgment of  
sentence entered September 26, 1988, in the  
Court of Common Pleas of Westmoreland  
County.

The appellant, Robert E. Welsh, was cited for violations of Sections 3362 (a) (2)<sup>1</sup>, 3334 (a)<sup>2</sup> and 3733 (a)<sup>3</sup> of the Motor Vehicle Code on September 3, 1987. Following a hearing on September 15, 1987, a District Magistrate found appellant guilty of the aforementioned charges.

---

<sup>1</sup>75 Pa.C.S.A. §3362 (a) (2) provides:

Maximum speed limits

(a) General rule. -- Except when a special hazard exists that requires lower speed for compliance with section 3361 (relating to driving vehicle at safe speed), the limits specified in this subsection or established under this subchapter shall be maximum lawful speeds and no person shall drive a vehicle at a speed in excess of the following maximum limits:

\* \* \*

(2) 55 miles per hour in other locations.

<sup>2</sup>75 Pa.C.S.A. §3334 (a) states:

Turning movements and required signals

(a) General rule.--Upon a roadway no person shall turn a vehicle or move from one traffic

After filing a timely appeal, a de novo hearing was held on February 17, 1988 and appellant was found guilty on all three counts. On February 29, 1988, appellant filed a motion in arrest of judgment. He also filed a motion for dismissal on April 26, 1988, as well as a motion to quash the Commonwealth's untimely post-verdict motion brief on May 5, 1988.

---

lane to another or enter the traffic stream from a parked position unless and until the movement can be made with reasonable safety nor without giving an appropriate signal in the manner provided in this section.

375 Pa.C.S.A. §3733 (a) provides:

Fleeing or attempting to elude police officer

(a) Offense defined.--Any driver of a motor vehicle who willfully fails or refuses to bring his vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle, when given visual or audible signal to bring the vehicle to a stop, is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of \$200.

Additionally, on May 16, 1988, appellant filed a motion for judgment of acquittal. These motions were denied by the lower court on May 17, 1988. On September 26, 1988, appellant was sentenced to pay an aggregate fine of \$272.00 plus \$30.00 E.M.S. plus costs. This appeal ensued.

Mr. Welsh presents the following issues for our consideration:

1. Whether there was sufficient evidence upon which to base appellant's convictions?
2. Whether it is necessary to prove intent to sustain a conviction under Section 3733 (a)?
3. Whether the defense provided by Section 3733 (c) applies since no evidence was presented that the Trooper displayed a sign of authority?
4. Whether defense counsel was ineffective?



5. Whether the lower court abused its discretion in:

a. accepting appellee's 21-day-late brief in answer to appellant's motion in arrest of judgment?

b. excusing appellees non-compliance with the Pennsylvania Rules of Criminal Procedure in its brief answering appellant's motion in arrest of judgment?

After carefully reviewing these claims and the record, we affirm.

Appellant first challenges the sufficiency of the evidence introduced against him at trial. Appellant claims that the testimony of the police officer, upon which appellant's conviction was based, was not credible because it was riddled with inconsistencies and contradictions.

In evaluating the sufficiency of the evidence, we must view the evidence in the light most favorable to the Commonwealth and draw all reasonable inferences favorable to the

verdict winner to determine whether there is enough evidence to enable the trier of fact to find every element of the offense charged beyond a reasonable doubt. Commonwealth v. Rawles, 501 Pa. 514, 462 A.2d 619 (1983). Additionally, the trier of fact is free to believe all, part or none of the evidence adduced at trial. Commonwealth v. Wienckowski, 371 Pa. Super. 153, 537 A.2d 866 (1988).

In the case sub judice, the lower court, acting as fact finder, found that Trooper Stanley's testimony was worthy of belief. (L.C.O. 9-12-88 at p. 5). The court below summarized his testimony as follows:

On September 3, 1987, Trooper Frank Stanley of the Pennsylvania State Police was on duty as a roving radar patrol unit. He was using a hand-held radar unit which had been properly tested and calibrated. At approximately 3:55 P.M., Trooper Stanley located himself on Pennsylvania Route 380 in an unmarked police vehicle. Defendant passed by Trooper Stanley and registered a reading on the radar unit of 66 miles per hour in a 55

mile-per-hour zone. After the reading was taken by Trooper Stanley, the trooper pulled out and pursued the defendant. Because Trooper Stanley was in an unmarked vehicle, he put a magnet red light on the roof of his car, used his four-way flashers, and turned on a siren, which sent off a continuous blare.

Trooper Stanley then testified that he caught up to the defendant's vehicle, pulling alongside Defendant. The defendant then looked over at Trooper Stanley, and Trooper Stanley motioned the defendant to pull over. According to Trooper Stanley's testimony, the defendant did not pull over. Trooper Stanley then testified that he decreased his speed and tried to get in the lane of traffic behind the defendant. However, before Trooper Stanley was able to do so, the defendant turned right on to Sardis Road, without giving a turn signal and without slowing down.

Eventually, Trooper Stanley was able to move into the right lane and to turn off onto Sardis Road, where Defendant had previously turned. After a short while, Trooper Stanley caught sight of Defendant and pursued him. When Trooper Stanley finally caught up to the defendant, he was able to pull him over. Although the defendant refused to respond to Trooper Stanley's questions about why he had not pulled over earlier when they were still on Route 380 along side each other, the defendant did tell Trooper Stanley that he was on Sardis

Road because he had made a wrong turn. The defendant had also told Trooper Stanley that he had been travelling Route 380 for six (6) years going to and from his place of employment. Trooper Stanley also testified that the distance which he had followed Defendant from the time he first saw him until the time he finally pulled him over was between three and one-half (3-1/2) to four (4) miles.

(L.C.O. 9-12-88 at pp. 3-4).

Viewing this evidence in the light most favorable to the Commonwealth, we find that it was sufficient to support appellant's convictions.

Appellant next asserts that the Commonwealth failed to prove all the elements necessary to sustain a conviction under Section 3733 (a) of the Motor Vehicle Code. Specifically, appellant argues that there was no evidence submitted which proved that he willfully failed or refused to stop for Trooper Stanley. Rather, appellant contends that he simply misunderstood the Trooper's signals because

they were unclear and misleading. Appellant argues that he was unaware that the car following him was a police car since it was unmarked. He maintains that he believed the Trooper wanted him to bear right to clear the path for an emergency vehicle.

The lower court, however, found Trooper Stanley's testimony persuasive. The Trooper testified that he pursued appellant for 3-1/2 to 4 miles with a siren blaring and lights flashing. Additionally, the appellant testified that he saw the Trooper's signals and heard the siren although he failed to pull over.

Viewing this evidence in the light most favorable to the Commonwealth, we find that it was not unreasonable to infer that appellant's failure to stop was willful.

In his third argument, appellant asserts that the defense provided by Section 3733 (c) applies because the Trooper was driving an unmarked car and he failed to display a badge

or other sign of authority. Section 3733 (c) provides:

**Defenses.--It is a defense to a prosecution under this section that the pursuing police vehicle was not clearly identifiable by its markings or, if unmarked, was not occupied by a police officer who was in uniform and displaying a badge or other sign of authority.**

Appellant contends that it is unreasonable to consider an unmarked police car identifiable simply because it has flashing lights and a siren. In support of this contention, appellant argues that any emergency vehicle could possess these attributes.

To the contrary, we find that the lower court properly concluded that the defense provided in §3733 (c) was inapplicable in the instant case. The Trooper was in uniform and a siren accompanied by flashing lights is tantamount to a sign of authority. Therefore, appellant's third contention must fail.



Next, appellant claims that he was deprived of his right to a fair trial due to ineffective assistance of trial counsel. Appellant makes reference to at least fifteen examples of his counsel's ineffectiveness revolving around his failure to: a) impeach the Trooper's testimony via prior inconsistent statements; b) understand the charges lodged against appellant and the applicable law; c) investigate the facts surrounding the incident; d) obtain a tape recording or official transcript of the preliminary hearing; e) obtain physical evidence such as photographs or official maps and f) present expert testimony to establish that it was impossible for appellant to have safely stopped.

The process of analyzing a claim of ineffective assistance of counsel is threefold. First, the appellant must demonstrate that the underlying claims are of arguable merit. Second, he must establish that the particular

course chosen by trial counsel had no reasonable basis designed to effectuate the appellant's interests. Third, he must describe the manner in which his counsel's ineffectiveness worked to his prejudice.

Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987).

After carefully reviewing the record, we find that these claims are not of arguable merit and consequently they must fail.

Finally, appellant contends that the court below abused its discretion in both accepting an untimely brief submitted by appellee in response to appellant's motion in arrest of judgment and in excusing appellee's non-compliance with the Pennsylvania Rules of Criminal Procedure in this brief. Appellant claims that because the Commonwealth's brief was filed 21 days late and, in it, the Commonwealth failed to number the paragraphs and respond specifically to the



allegations of the motion, the brief should have been quashed. We disagree.

Pa.R.Crim.P. 2 provides:

Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay and as nearly as may be in consonance with the rules of statutory construction.

In its opinion, the lower court noted that although the Commonwealth's brief did not strictly comply with the mandates of several procedural rules, the appellant was not prejudiced thereby. Therefore, the court below found that an order dismissing the proceedings was not warranted. It was within the discretion of the court below to make this determination and we find no abuse of that discretion.

Judgment of sentence affirmed.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF  
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

No. 1915 C 1987

COMMONWEALTH OF PENNSYLVANIA )

-vs- )

ROBERT E. WELSH )

OPINION

and

ORDER

The defendant was cited for violating Sections 3334, 3362 and 3733 of the Motor Vehicle Code on September 3, 1987. On September 15, 1987, a hearing on these charges was held before a district magistrate, after which the defendant was found guilty of all three (3) charges. Defendant then filed a timely appeal to the Court of Common Pleas of Westmoreland County. On February 17, 1988, a hearing de

noyo was held before the Court. After the hearing, the defendant was again found guilty on all three (3) charges. Defendant then filed post-verdict motions. After a request for oral argument, oral argument was made by counsel for the Commonwealth and the defendant on June 17, 1988. The post-verdict motions are presently before the Court for disposition.

In his oral argument, Defendant stressed as his main points in support of his post-verdict motions that the trooper who arrested him on September 3, 1987, had forgotten the incident that actually occurred and, further, that the trooper changed his testimony from the preliminary hearing to the Court hearing de novo.

No official transcript of the preliminary hearing was made. Therefore, the Court can only pass upon the credibility of the witnesses who testified at the de novo hearing and the sufficiency of the evidence that existed to find

Defendant guilty of the charges under the Motor Vehicle Code beyond a reasonable doubt. In evaluating the sufficiency of the evidence, the test is whether, viewing the evidence in the light most favorable to the Commonwealth and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to enable the trier of fact to find every element of the offense charged beyond a reasonable doubt. Commonwealth v. Santiago, 382 A.2d 1200 (1978). Moreover, in applying this test, the entire trial record must be evaluated, and all evidence actually received must be considered, whether or not the trial court's rulings thereon were correct. Commonwealth v. Boyd, 344 A.2d 864 (1975). Furthermore, the trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part, or none of the evidence. Commonwealth v. Murray, 334 A.2d 255 (1975).

Viewed in this light, the record reveals the following. On September 3, 1987, Trooper Frank Stanley of the Pennsylvania State Police was on duty as a roving radar patrol unit. He was using a hand-held radar unit which had been properly tested and calibrated. At approximately 3:55 P.M., Trooper Stanley located himself on Pennsylvania Route 380 in an unmarked police vehicle. Defendant passed by Trooper Stanley and registered a reading on the radar unit of 66 miles per hour in a 55 mile-per-hour zone. After the reading was taken by Trooper Stanley, the trooper pulled out and pursued the defendant. Because Trooper Stanley was in an unmarked vehicle, he put a magnet red light on the roof of his car, used his four-way flashers, and turned on a siren, which sent off a continuous blare.

Trooper Stanley then testified that he caught up to the defendant's vehicle, pulling alongside Defendant. The defendant then

looked over at Trooper Stanley, and Trooper Stanley motioned the defendant to pull over. According to Trooper Stanley's testimony, the defendant did not pull over. Trooper Stanley then testified that he decreased his speed and tried to get in the lane of traffic behind the defendant. However, before Trooper Stanley was able to do so, the defendant turned right on to Sardis Road, without giving a turn signal and without slowing down.

Eventually, Trooper Stanley was able to move into the right lane and to turn off onto Sardis Road, where Defendant had previously turned. After a short while, Trooper Stanley caught Defendant and pursued him. When Trooper Stanley finally caught up to the defendant, he was able to pull him over. Although the defendant refused to respond to Trooper Stanley's questions about why he had not pulled over earlier when they were still on Route 380 along side each other, the defendant

did tell Trooper Stanley that he was on Sardis Road because he had made a wrong turn. The defendant had also told Trooper Stanley that he had been travelling Route 380 for six (6) years going to and from his place of employment. Trooper Stanley also testified that the distance which he had followed Defendant from the time he first saw him until the time he finally pulled him over was between three and one-half (3-1/2) to four (4) miles.

The only other testimony presented at the de novo hearing was that of the defendant. The defendant's testimony was different from Trooper Stanley's testimony. The defendant testified that he first noticed the police vehicle at the junction of Route 380 and 286. He further stated that he saw Trooper Stanley alongside a pick-up truck and thought Trooper Stanley was motioning traffic to clear off the road for an emergency vehicle. Defendant related that he believed the closest Trooper



Stanley had come to his vehicle was when the trooper's front bumper was next to the defendant's rear bumper. The defendant also testified that he turned his turn signal on as he proceeded onto Sardis Road, and that he never saw Trooper Stanley behind him, nor heard the siren from Trooper Stanley's vehicle.

The credibility of witnesses is solely within the province of the trier of fact. The trial Court in this case was in a unique position to not only hear the testimony of the witnesses, but also, to view their demeanor and assess the accuracy and believability of what they had to say. After making a careful evaluation of the different testimony of the two (2) witnesses who testified in this case, the Court found Trooper Stanley's testimony to be worthy of belief. Furthermore, the Court found that the facts as testified credibly to by Trooper Stanley were more than sufficient to support findings



of guilty on all three (3) charges, which were made against the defendant.

The defendant has also argued that the testimony of Trooper Stanley and the Commonwealth was insufficient to establish that the trooper was in uniform, and that he displayed a sign of authority as required by Section 3733(c) of the Motor Vehicle Code. However, a careful review of the transcript shows that Trooper Stanley was in uniform at the time of the incident. The transcript also indicates that although the unmarked vehicle was not a typical police car, it was equipped with a portable red light and sirens, which were used by the trooper to attempt to stop Defendant's vehicle.

Finally, the defendant has presented a Motion for Judgment of Acquittal, alleging that the Commonwealth has violated the Rules of Criminal Procedure, has misinterpreted the Pennsylvania Motor Vehicle Code, and has

relied solely on the testimony of Trooper Stanley, whom Defendant alleges has contradicted himself on every significant point. Initially, it should be noted that there appears to be no fatal defect in the procedures employed by the Commonwealth which violate either the Rules of Criminal Procedure or misinterpret the law. Furthermore, it is clear that the Commonwealth has relied solely on the testimony of Trooper Stanley. However, this is quite understandable, since Trooper Stanley was the only other individual present during this incident and at the time of the defendant's arrest. The Court has reviewed the testimony of Trooper Stanley and finds nothing contradictory within that testimony. Rather, the Court finds the testimony to be credible and sufficient to form a basis for Defendant's conviction of these charges under the Motor Vehicle Code.

\* \* \* \* \*

ORDER OF COURT

AND NOW, this 12th day of August, 1988, after careful consideration of the various motions filed by Defendant in the above-captioned matter, the following Order is hereby entered:

(1) Defendant's Post-Verdict Motions in the nature of a Motion for a New Trial and a Motion for Arrest of Judgment are Denied;

(2) Defendant's Motion for Dismissal is Denied;

(3) Defendant's Motion to Quash Commonwealth's Brief in Support of Denial of Post-Verdict Motions is Denied;

(4) Defendant's Motion for Judgment of Acquittal is Denied.

A sentencing hearing in the above-captioned matter is scheduled for September 26, 1988, at 9:00 A.M., before the undersigned.

BY THE COURT:

Donetta W. Ambrose, Judge

## APPENDIX C

IN THE COURT OF COMMON PLEAS OF  
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

No. 1915 C 1987

COMMONWEALTH OF PENNSYLVANIA )

-VS-

ROBERT E. WELSH

## ORDER

ENTERED: SEPTEMBER 26, 1988

THE COURT: As a result of your conviction of three violations of the Motor Vehicle Code, I am imposing the following sentence. For your conviction of Section 3733, I am ordering that you pay a fine of \$200.00, a \$10.00 E. M. S. fine, plus costs of prosecution that may be applicable.

For your violation and conviction of Section 3334, I am ordering that you pay a fine of \$25.00, plus a \$10.00 E. M. S. fine, plus any applicable costs.

For your conviction of Section 3362, I am imposing the following sentence: A fine of \$47.00, a \$10.00 E. M. S. fine, plus any applicable costs. That is the sentence to be imposed.

APPENDIX D

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01623 Pittsburgh, 1988

COMMONWEALTH OF PENNSYLVANIA,

Appellee

V.

ROBERT E. WELSH,

Appellant

ORDER OF COURT

The court hereby denies the application filed October 10, 1989 requesting reargument or recon-sideration of the decision dated September 26, 1989.

November 6, 1989

PER CURIAM

APPENDIX E

SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT

No. 675 W. D. Allocatur Docket 1989

COMMONWEALTH OF PENNSYLVANIA, :  
Appellee :

V. :

ROBERT E. WELSH, :  
Appellant :

ORDER OF COURT

June 22, 1990  
PER CURIAM:  
Petition denied.